Supreme Court, U. S.
FILED
JUL 27 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 79-135

NATIONAL BROADCASTING COMPANY, INC.,
PETITIONER,

v.

C. BRIAN BURKE, M.D.,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

W. MICHAEL DUNN, ESQUIRE,
1000 Elm Street,
Manchester, New Hampshire 03101.
(603) 668-0300
Counsel for Petitioner

SHEEHAN, PHINNEY, BASS & GREEN
PROF. ASS'N
JAMES E. HIGGINS, ESQUIRE
DANIEL W. SKLAR, ESQUIRE
Of Counsel

ADDISON C. GETCHELL & SON, INC. - THE LAWYERS' PRINTER - BOSTON

Table of Contents.

Opinions below 1

Jurisdiction 2

Questions presented 2

Statement of the case 3

Reasons for granting the writ 6

I. The decision below is contrary to the accepted standards of general and limited publication in common law copyright granting respondent, and others like him, the ability to acquire windfall profits from his own mistakes 6

II. The court below improperly extended an "implied restriction" exemption thereby totally undermining the accepted rules of law governing common law copyright 11

Conclusion 14

Appendix 15

A. Opinion of District Court 15

B. Opinion of Court of Appeals 24

C. Judgment of Court of Appeals 35

D. Order of Court of Appeals Denying Petition for Rehearing 36

E. Order of Court of Appeals Granting Motion to Stay the Mandate Pending Petition for Certiorari 37

F. Letter of September 3, 1973 from Professor Grzimek to Dr. Burke 38

G. Reply Letter of September 17, 1973 and Translation Thereof from Dr. Burke to Professor Grzimek 39

H. Letter of December 8, 1976 from Professor Grzimek to Colin Willock 41

I. Judgment of District Court 42

Table of Authorities Cited.

CASES.

American Tobacco Co. v. Werckmeister, 207 U.S. 284 (1907) 6, 7, 9, 11

American Visuals Corp. v. Holland, 239 F. 2d 740 (2d Cir. 1956) 7

Caliga v. Inter Ocean Newspaper Co., 215 U.S. 182 (1909) 6

King v. Mister Maestro, Inc., 224 F. Supp. 101 (S.D. N.Y. 1963) 12

Krahmer v. Luing, 317 A. 2d 96 (N.J. Super. 1974) 12

Masterson v. McCroskie, 573 P. 2d 547 (Colo. 1978) 11, 12

National Comics Publications, Inc. v. Fawcett Publications, Inc., 191 F. 2d 594 (2d Cir. 1951) 7, 10

White v. Kimmell, 193 F. 2d 744 (9th Cir. 1952) 7, 10, 13

STATUTES.

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1332 3

28 U.S.C. § 2101(f) 6

Uniform Commercial Code, Article 3 7

MISCELLANEOUS.

Fed. R. A. P. 40 6

Fed. R. A. P. 41(b) 6

Fed. R. Civ. P. 56 5

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1978.

No.

NATIONAL BROADCASTING COMPANY, INC.,
PETITIONER,
v.
C. BRIAN BURKE, M.D.,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Petitioner, National Broadcasting Company, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-referenced case on May 17, 1979.

Opinions Below.

The amended opinion of the United States District Court for the District of New Hampshire is reported in 462 F. Supp. 267 (D. N.H. 1978). A copy of this opinion, in which the District Court granted Petitioner's Cross-Motion for Summary Judgment and dismissed the action, appears in Appendix A.

The opinion of the United States Court of Appeals for the First Circuit has not yet been officially reported, and is unofficially reported in — U.S.L.W. — (1st Cir. 1979). A copy of the opinion appears in Appendix B of this Petition. The Court of Appeals reversed the District Court's judgment and ordered the District Court to grant Respondent's Motion for Summary Judgment on the issue of liability and proceed to the issue of damages.

Jurisdiction.

Petitioner respectfully seeks review of the judgment of the United States Court of Appeals for the First Circuit entered on May 17, 1979 (Appendix C). The Court of Appeals reversed the District Court and ordered it to grant Respondent's Motion for Summary Judgment and proceed to the issue of damages. Petitioner's timely Petition for Rehearing was denied by the Court of Appeals on June 11, 1979 (Appendix D). On June 19, 1979, the Court of Appeals granted Petitioner's Motion to Stay the Mandate Pending the Filing of this Petition for a Writ of Certiorari (Appendix E).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Did Respondent forfeit his common law copyright by distributing the original film to Professor Grzimek without placing any restrictions on his use of the film?

2. Did the Court of Appeals err by applying an "implied restrictions" exception to the publication in this case?

Statement of the Case.

Respondent brought this suit in the United States District Court for the District of New Hampshire as a common law copyright action. Respondent sought damages for the alleged unauthorized use of his film by Petitioner. Subject matter jurisdiction was conferred by 28 U.S.C. § 1332. Respondent, Dr. C. Brian Burke, is a physician at the Mary Hitchcock Memorial Hospital in Hanover, New Hampshire. Petitioner, National Broadcasting Company, Inc., is a corporation with its principal place of business in New York, New York.

The underlying facts material to the issue of liability are undisputed.

Sometime during March, 1972, while on a safari in Tanzania, Africa, the Respondent, Dr. C. Brian Burke (hereinafter "Burke"), filmed a zebra mare returning to her foal to attack the lioness that had just killed her foal. This unusual encounter constitutes the subject matter of the short film taken by Burke and referred to by the Respondent as the "Serengeti Incident."

Subsequently, "National History" Magazine published a letter and still photograph describing the incident which had been submitted by Burke. As a result of this letter, Burke was contacted by Prof. Bernhard Grzimek (hereinafter "Grzimek") of Frankfurt, Germany, a professor at the University of Giessen in Frankfurt and a co-editor of "Das Tier" (The Animal) Magazine. In his letter to Burke dated September 3, 1973 (Appendix F), Grzimek requested permission to translate the article into German for "Das Tier" and asked Burke for a copy of the film for use in his lectures and on German television. Burke promptly replied by a letter dated September 17, 1973 (Appendix G), in which he stated, in relevant part:

> The pictures and the film will be returned to me shortly, and as soon as I receive them I shall send them to you.
>
> The interesting film and the pictures are in colour. The film was taken with super 8mm film and 18 frames per second, therefore I am not quite certain if the film is feasible for television-broadcasting. This I will leave to the technicians.

Grzimek used the film during the course of his lectures, and it was shown at least once on public television in West Germany.

Three years later, Grzimek was contacted by Colin Willock, the executive director of Survival Anglia Limited (hereinafter referred to as "SAL"), a British company specializing in nature films. In his letter to Grzimek, dated November 17, 1976, Willock requested a copy of the "Serengeti Incident" for use in a special television film SAL was producing. On November 24, 1976, Grzimek forwarded the film to Willock in accordance with his request, and in his accompanying letter he stated in part, that:

> It is true that I have the zebra mare attacking a lioness which has caught her foal.
> I am sending it by same mail registered. It is original, blow up from 8 mm. Please return a good copy or the original to me.

Shortly thereafter, on November 29, 1976, Willock wrote back to Grzimek acknowledging the receipt of the film and stating his intention to make a copy of the same. In this same letter of November 29, 1976, Willock inquired about compensating Burke for the use of the film. By letter dated December 8, 1976 (Appendix H), Grzimek responded to Willock as follows:

> [T]hanks for your letter of 29th November. I paid Dr. Burke for the stills, but not for the film. I had the impression that he was quite happy that his film was used in television. *If* you want to contact him, his address is: [address omitted] [emphasis added].

Consequently, SAL used 33 feet of the "Serengeti Incident" as part of their one hour special entitled "The Parenthood Game." This special was licensed by the Petitioner, National Broadcasting Company (hereinafter referred to as "NBC") from SAL and aired on January 27, 1977. As a result of NBC's use of the special, which contained the footage in question, Burke filed this suit on July 12, 1977, alleging that NBC had violated his copyright in the film.

After completing discovery, the parties filed cross-motions for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Both motions, along with the supporting affidavits, focused solely on the issue of liability, i.e., whether or not Respondent had forfeited his copyright in the film prior to January 27, 1977, the date when the Petitioner aired the special program. The case was heard in the United States District Court, Concord, New Hampshire on November 3, 1978. On December 11, 1978, the Court denied Respondent's Motion for Summary Judgment, granted Petitioner's Cross-Motion for Summary Judgment, and thereby dismissed the action (Appendix I). In its opinion, amended December 28, 1978 (Appendix A), the District Court held that Respondent had forfeited his common law copyright because his unrestricted distribution of the film to Grzimek constituted general publication as a matter of law.

Respondent appealed the District Court's judgment to the United States Court of Appeals for the First Circuit on December 13, 1978. On May 17, 1979, the Court of

Appeals reversed the judgment of the District Court and remanded to the District Court to grant Respondent's Motion for Summary Judgment and proceed to the issue of damages. The Court held that Respondent had not forfeited his copyright because an "implied restrictions" exception applied in this case and hence Respondent's distribution to Grzimek constituted limited publication as a matter of law.

Petitioner filed a timely Petition for a Rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure. Petitioner sought a rehearing because it had defenses other than general publication which had been pleaded, but not yet adjudicated. The Court of Appeals denied this Petition on June 11, 1979 (Appendix D). Petitioners then filed a Motion to Stay the Mandate Pending Petition for a Writ of Certiorari, pursuant to 28 U.S.C. § 2101(f) and Rule 41(b) of the Federal Rules of Appellate Procedure. This motion was granted on June 19, 1979 (Appendix E).

Reasons for Granting the Writ.

I. The Decision Below Is Contrary to the Accepted Standards of General and Limited Publication in Common Law Copyright Granting Respondent, and Others Like Him, the Ability to Acquire Windfall Profits from His Own Mistakes.

In common law copyright, once the creator permits a "general publication" of his work, he forfeits all his rights in that work. *Caliga* v. *Inter Ocean Newspaper Co.*, 215 U.S. 182 (1909). In *American Tobacco Co.* v. *Werckmeister*, 207 U.S. 284 (1907) this Court stated that a "general publication" occurs when there is "'such a dissemination of the work of art itself among the public,

as to *justify the belief* that it took place with the intention of rendering such work common property.'" *Id.*, 207 U.S. 284, 299-300 (emphasis added). The creator of a literary or artistic work must be cautious when distributing it. If his objective behavior leads third parties to the reasonable conclusion that his work is being dedicated to the public domain, subsequent reliance on that conclusion will destroy his common law copyright.

The twofold reasoning for this objective legal standard is as obvious as it is sound. First, the creator of an artistic work may not seek damages from an innocent third party based on his secretive subjective intent, since, here, as in many other areas of the law, the courts will not impose damages upon a party who reasonably relied on the objective behavior of another.

Second, the *American Tobacco* standard also embodies the rules governing suits between "two innocent parties." For example, an analogy may be drawn from Article 3 of the Uniform Commercial Code which protects the "holder in due course." Liability is placed on the party who draws a check and allows it to leave his possession with blank spaces even though a third party wrongfully completed the instrument. When there are two "innocent parties," the one who is most responsible for the injury should be the party compelled to bear the loss. These two policy considerations have always governed the resolution of the issues raised in cases similar to the case at bar. Cf. *American Visuals Corp.* v. *Holland*, 239 F. 2d 740 (2d Cir. 1956); *National Comics Publications, Inc.* v. *Fawcett Publications, Inc.*, 191 F. 2d 594 (2d Cir. 1951); and *White* v. *Kimmell*, 193 F. 2d 744 (9th Cir. 1952). Following the case law developed in these Circuits, a Court should determine if Petitioner was justified or reasonable in its belief that, based on his letter to Professor Grzimek

dated September 17, 1973, Respondent had dedicated his work to the public domain. Clearly, Professor Grzimek held that belief. He promptly forwarded his copy of the film to SAL upon request and simply stated to a brother publisher that it was his "impression" that Dr. Burke was quite happy to have his film used for television. The issue is whether Professor Grzimek's subjective belief was reasonable and justified.

However, in its review of the case at bar, the United States Court of Appeals for the First Circuit did not examine the justifiability or reasonableness of Petitioner's belief based on Respondent's objective conduct. Instead, the Court merely reviewed the facts to determine if they supported the Respondent's allegations that his subjective intent was to limit Professor Grzimek's use of the film to his lectures and television program. In this regard, the Court stated:

> That Dr. Burke was "honored" by Dr. Grzimek's request and readily agreed to it seems a function of Dr. Grzimek's stature as a naturalist, and is *consistent with* [Burke's] *believing* Dr. Grzimek would use the film only for his own stated purposes.

(Appendix B, p. 34.) (Emphasis added.)

This one-sided view of the case is first clearly erroneous under existing law. Second, it constitutes a serious departure from a well established objective legal standard which may lead to serious and inequitable results in future cases. In focusing on subjective intent instead of objective behavior, the decision of the Court of Appeals is in conflict with the decisions of the other Circuits which have addressed this issue.

The basic effect of the opinion below is to eliminate the fairly certain legal standard which has governed this area of the law and substitute it with a case by case re-

view of criteria which are incapable of definition, and thus even the most reasonable and prudent person would be exposed to large monetary damages. The case at bar provides an excellent illustration of this result.

From the language quoted directly above, one may infer that Judge Campbell concluded that Dr. Burke never stopped to consider his copyright to the film when he distributed it due to his excitement arising from his sudden notoriety among famous naturalists. Thus the Court placed the burden on Professor Grzimek to realize this and request Dr. Burke's consent when, three years after receiving the film, he decided to send a copy of it to SAL. Similarly, under the decision below, if the creator has some reason to believe that the person receiving the tangible work will voluntarily refrain from subsequent distributions, then he need not express any limitations thereon. An innocent third party is forced to suffer substantial expense for no other reason perhaps, than Professor Grzimek's "stature as a naturalist." Also, no legal standard is created whereby other persons can conform their behavior.

As demonstrated above, any departure from the basic rule set down by this Court in *American Tobacco Co.* v. *Werckmeister, supra,* will lead to unjustifiable results providing windfalls to persons who were either unmindful of, or remiss in, their duty to protect their literary or artistic property. This result is especially unpalatable in the case where an innocent, and well removed, third party is subjected to this liability. It would appear that an investigation similar to a real estate title search must be conducted before one can safely assume that a specific work is not permeated with inalienable copyright claims.

Petitioner's contention can be supported further by a review of the test governing the concept of a "limited

publication." When the creator commits a limited publication of his work, i.e. by delivering the work to a "definitely selected group and for a limited purpose, and without the right of . . . reproduction," *White* v. *Kimmell,* 193 F. 2d 744, 746-747 (9th Cir. 1952), he does not forfeit his common law copyright. In each case dealing with this doctrine, courts have looked to see if the creator had satisfied *his* burden of expressing the required limitation on the use of his work. *National Comics Publications, Inc.* v. *Fawcett Publications, Inc., supra.* Accordingly, if he had articulated the necessary restrictions it would mean that the defendant was not justified in his belief that the work had become a part of the public domain.

Again, the Court below failed to utilize the traditional rule of law despite the fact that the opinion clearly states:

> True, Dr. Burke did not state explicitly in his letter that Dr. Grzimek could not distribute copies of the film to others, or use it for other purposes . . . .

(Appendix B, p. 34.)

Nevertheless, the First Circuit disposed of the "limited publication" test on the mere fact Professor Grzimek had made a "specific request" to use the film. No other court has held that a "specific request" constitutes a "limited publication." Aside from creating a serious conflict in this area of the law, this rule will permit a plaintiff to impose liability upon a third party by establishing that he was justified in reliance upon the recipient's conduct in requesting the work. This result is totally indefensible since the party subject to liability will never have knowledge of, or even access to, that type of information.

Finally, this application of the "limited publication" standard permits the creator, who surrendered his work

believing that it had no commercial value, to recover against the recipient, or some third party by merely claiming that *he* had been under the impression that it was only going to be used in a limited way. The rule of *American Tobacco* and its progeny is designed to guard against such a result. Yet on these facts, the Court below determined that the innocent third party will be held accountable.

II. The Court Below Improperly Extended an "Implied Restriction" Exemption Thereby Totally Undermining the Accepted Rules of Law Governing Common Law Copyright.

The courts have created a very precise exception to the rule which requires the creator to express the necessary restrictions on the use of his work, in order to avoid a finding of a "general publication." In a number of cases where by law, or trade custom, the creator of an original work is required to deliver copies of it to others, the courts have reasonably concluded that although no limitations were expressed, they could be implied from the circumstances. The typical situation resulting in the application of this exception can be seen in the case of *Masterson* v. *McCroskie,* 573 P. 2d 547 (Colo. 1978). In that case the plaintiff, an architect, was required by ordinance to deliver copies of his plans to both the local planning board and building inspector. Additionally, trade custom required him to deliver copies to several building contractors for the purpose of obtaining sealed bids. None of these copies were delivered subject to express limitations and therefore, the defendant argued that a "general publication" had occurred. In finding for the plaintiff, the Colorado Supreme Court correctly concluded that under those circumstances, the creator could be re-

lieved of his duty to express the limitations he wishes to have placed on his work. The simple rationale supporting this exception is no more than a strict application of the "general publication" test. The Court merely concluded that under those circumstances one could not "justify the belief" that the creator had intended to dedicate his work to the public domain. See also, *Krahmer* v. *Luing*, 317 A. 2d 96 (N.J. Super. 1974); and *King* v. *Mister Maestro, Inc.*, 224 F. Supp. 101 (S.D. N.Y. 1963).

Prior to the opinion below, no court has found an "implied restriction" under circumstances which did not rise to the level of the *Masterson* case. Nevertheless, under the facts at bar, where it is readily apparent that Respondent was not required to forward his film to Professor Grzimek for copying, the Court below stated that:

> [W]e think such limitations are reasonably to be *implied*: Dr. Grzimek made a specific request to use the film for a specific purpose, and Dr. Burke's affirmative response cannot be thought to have authorized any further use or other purpose.

(Appendix B, p. 34.) (Emphasis added.)

To apply the implied restrictions exception here is to apply it in all cases. This expansion of the implied restrictions exception creates numerous problems for both the courts and future litigants. First, it is impossible to formulate a standard which will lead to consistent results when a party claims that he was relying on implied restrictions arising from his interpretation of the request received from a particular recipient. For example, when a person says to an author: "I would like a copy of your manuscript," a mere affirmative response will not result in a "general publication." Instead, the author may now meet his burden by alleging that he had subjectively understood the request to mean that the recipient was

only going to read the manuscript himself and that he would not thereafter make and distribute copies of the same. This result is in direct conflict with the Ninth Circuit's opinion in *White* v. *Kimmell, supra.* The First Circuit has somehow elevated Dr. Grzimek's letter to Dr. Burke above the "mere request" noted in the *White* case and it does so without articulating any legal standard. The practical effect of this decision will be to open the floodgates of litigation founded on the allegation that "I thought he only wanted it for his personal use." It is virtually impossible to formulate a meaningful legal standard once the court departs from the current test of implied restrictions. Hence, these suits will lead to inconsistent results with an accompanying adverse effect on those who benefit society by actively pursuing and disseminating literary, musical and artistic works.

Conclusion.

For the reasons stated above, it is respectfully requested that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

NATIONAL BROADCASTING
COMPANY, INC.
By Its Attorneys:
SHEEHAN, PHINNEY, BASS
& GREEN
PROF. ASS'N
By:
W. MICHAEL DUNN, ESQUIRE,
1000 Elm Street,
Manchester, New Hampshire 03101.
(603) 668-0300
Counsel for Petitioner

SHEEHAN, PHINNEY, BASS
& GREEN
PROF. ASS'N
JAMES E. HIGGINS, ESQUIRE
DANIEL W. SKLAR, ESQUIRE
Of Counsel

Appendix A.

C. Brian BURKE, M.D.

v.

NATIONAL BROADCASTING COMPANY, INC.

Civ. A. No. 77-236.

United States District Court, D. New Hampshire.

Dec. 11, 1978.

As Amended Dec. 28, 1978.

Plaintiff brought action for damages and other relief for claimed infringement of his alleged common-law copyright in a motion picture film. On plaintiff's motion for partial summary judgment and defendant's cross motion for summary judgment, the District Court, Maletz, J., sitting by designation, held that when plaintiff as holder of a common-law copyright in a wildlife film, voluntarily gave film to professor at German university, without placing any restrictions on persons who could view film nor upon purpose for which it could be shown, and knowing that film would be copied and used on German television, he allowed a "general publication" to occur which divested him of common-law protection.

Plaintiff's motion for partial summary judgment denied; defendant's cross motion for summary judgment granted and action dismissed.

Randolph J. Reis, Brown & Nixon Professional Ass'n, Manchester, N. H., for plaintiff C. Brian Burke, M.D.

James E. Higgins, Sheehan, Phinney, Bass & Green, Professional Ass'n, Manchester, N. H., for defendant National Broadcasting Co.

ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

MALETZ, Judge [1]:

This is an action seeking damages and other relief for claimed infringement of plaintiff's alleged common-law copyright in a motion picture film. Jurisdiction is based on diversity of citizenship and the amount in controversy exceeds $10,000. The facts bearing on the question of liability [2] are not in dispute and to the extent relevant are as follows:

In March 1972, the plaintiff, Dr. C. Brian Burke, a New Hampshire anesthesiologist, while on a photographic safari on the Serengeti Plain in East Africa (now Tanzania) observed and filmed an unusual affray between a zebra mare and a lioness. Specifically, after the lioness had attacked and killed a zebra foal, thereby causing the herd to scatter, the maternal mare returned and attacked the lioness. The ensuing combat constituted the subject matter of a short film that was taken by Dr. Burke and referred to by him as the "Serengeti Incident."

Subsequently, in the April 1972 edition of *Natural History* there appeared an article by a Dr. George Schaller stating that zebras do not protect their young against lions. After reading this article, Dr. Burke responded by way of a letter to *Natural History* and Dr. Schaller in which he informed them that he had witnessed and filmed an incident contrary to Dr. Schaller's assertion. This letter was printed in the August/September 1972 issue of *Natural History.*

---

[1] Judge of the United States Customs Court sitting by designation pursuant to 28 U.S.C. § 293(b).

[2] These cross-motions for summary judgment concern only the question of liability, which is why plaintiff's motion seeks only partial summary judgment.

One Bernhard Grzimek, a professor at the University of Giessen in Frankfurt, Germany, and a co-editor of *Das Tier* (*The Animal*) magazine read Dr. Burke's letter in *Natural History* and thereafter on September 3, 1973, wrote the following letter to Dr. Burke:

> I just found your letter in NATURAL HISTORY, August/September 1972 page 12 "Incident in the Serengeti". I hope that you have no objection that we print a German translation of your letter in our journal DAS TIER (THE ANIMAL). We also would like to get a copy of your pictures and, in case you have done several, of the other ones too.
>
> I personally would like to use the film which was done of this incident in my lectures at the university and in a television programme. Is this film still available? Was it done in colour? Would it be possible to get a copy of it on my expenses?
>
> Many thanks in advance of your co-operation.

By letter dated September 17, 1973, Dr. Burke replied to Professor Grzimek as follows:

> Thank you for your letter. It is for me a great honour that you wish to translate my letter "Incident in the Serengeti" into "das Tier."
> The pictures and the film will be returned to me shortly, and as soon as I receive them I shall send them to you.
>
> The interesting film and the pictures are in colour. The film was taken with Super 8mm film and 18 frames per second, therefore I am not quite certain if the film is feasible for television-broadcasting. This I will leave to the technicians.

> In February I will visit East Africa, and who knows what the Serengeti has to show.

After receiving Dr. Burke's film, Professor Grzimek had it shown during the course of his lectures and on public television in West Germany.

Several years later, Professor Grzimek was contacted by Colin Willock, the executive director of Survival Anglia Limited (SAL), a British company specializing in nature films. In his letter to Grzimek, dated November 17, 1976, Mr. Willock requested a copy of Dr. Burke's film for use in a Special television program about animal parenthood that SAL was producing. Professor Grzimek responded by letter dated November 24, 1976, advising that he was forwarding the film as requested and added that "[I]n the text must be mentioned that this shot was taken by an American visitor . . . [Dr. Burke] . . . ." SAL used 33 feet of Dr. Burke's film as part of its one-hour Special entitled "The Parenthood Game". This Special was purchased by the defendant National Broadcasting Company (NBC) from SAL and telecast over its network on January 27, 1977, from 8:00 to 9:00 p.m. As a result of NBC's use of the Special, which contained the footage in question, Dr. Burke has brought this suit alleging that NBC has violated his copyright in the film. It is to be observed that Dr. Burke has neither applied for nor received a copyright in the film pursuant to 17 U.S.C. § 101, *et seq.* (1976), or any other statutory source. Therefore, this action is based solely on availability of a common-law copyright.

Turning to the legal considerations, it is basic that one is entitled to an absolute common-law copyright in his work where he has not sought a federal statutory copyright. E. g., *American Tobacco Co. v. Werckmeister,* 207 U.S. 284, 28 S.Ct. 72, 52 L.Ed. 208 (1907). This

common-law copyright is an absolute property right which extends to television broadcasts and motion picture films and protects against unauthorized copying, publishing, vending, performing, recording, etc. 18 Am.Jur.2d, *Copyright and Literary Property* § 7 *et seq.* (1965); Nimmer, *On Copyright,* Vol. 1, § 56, *et seq.* (1976).

This common-law copyright remains with the creator until he permits a general publication, at which point the work becomes the property of the general public. *American Tobacco Co. v. Werckmeister, supra* at 299, 28 S.Ct. 72. Thus, the existence of Dr. Burke's copyright hinges on whether or not he permitted a general publication of his film to occur prior to its January 27, 1977 telecast by NBC.

Whether or not a "general publication" occurred does not depend on the actual intention of the creator; his intention is irrelevant. Rather, the question depends on what the creator did, i e., whether or not he voluntarily parted with the property. *King v. Mister Maestro, Inc.,* 224 F.Supp. 101, 103 (S.D.N.Y.1963). It is to be added that the test of general publication applies ". . . in this or any foreign country . . . ." *Caliga v. Inter Ocean Newspaper Co.,* 215 U.S. 182, 189, 30 S.Ct. 38, 40, 54 L.Ed. 150 (1909).

In contrast to a general publication, a limited publication does not divest the holder of his common-law protection. As the court stated in *White v. Kimmell,* 193 F.2d 744, 746-47 (9th Cir. 1952):

> [A] limited publication which communicates the contents of a [work] to a definitely selected group and for a limited purpose, and without the right of diffusion, reproduction, distribution or sale, is considered a 'limited publication', which does not result in loss of the author's common law right to his [work]; but

that the circulation *must be restricted both as to persons and purpose,* or it can not be called a private or limited publication. [Emphasis added.]

In *White v. Kimmell,* the plaintiff White was seeking a declaratory judgment that certain manuscripts produced by her husband were in the public domain and therefore the defendant did not possess an exclusive right to them. Specifically, upon completion of his book, Mr. White made several hundred copies which he distributed to anyone who requested a copy. He even allowed his secretary to distribute them to persons whom she knew might be interested in the subject matter. Each copy was accompanied by a short letter in which Mr. White expressed his hope that the reader would enjoy the book, and could either keep the book or pass it on to someone else. Similarly, he allowed one individual to make additional copies for distribution to her friends.

In holding that Mr. White had *generally* published his book, the court held that neither part of the "limited publication" test was satisfied, for the court found that Mr. White placed no restrictions on either the group of persons who could obtain a copy of his manuscript or on the purpose for which it could be used.

In point also is *American Visuals Corp. v. Holland,* 239 F.2d 740 (2d Cir. 1956). There, the plaintiff had distributed a copy of its pamphlet on public safety to some 200 insurance companies with the hope that they would purchase additional copies for distribution to their customers. The court noted that this activity alone would have constituted "limited publication" since it was sent to a limited group of persons (insurance companies) for a limited purpose (to solicit business). However, the plaintiff also left a number of copies on a table in the lobby of a hotel where an insurance convention was being held. Accordingly, since the plaintiff left the table unattended allowing anyone to obtain a copy of the pamphlet, the court ruled that a "general publication" had resulted due to the fact that there was a distribution where ". . . no limitation was placed on the person who might obtain copies." *Id.* at 743. *See also e. g., Patterson v. Century Production,* 93 F.2d 489, 492 (2d Cir. 1937); *Werckmeister v. American Lithograph Co.,* 134 F. 321 (2d Cir. 1904); *Jacobs v. Robitaille,* 406 F.Supp. 1145, 1149 (D.N.H.1976).

What this comes down to is that the "word 'general' with respect to publication . . . is of greatest significance. There can be a limited publication, which is a communication of the work to others under circumstances showing no dedication of the work to the public. A general publication is one which shows a dedication to the public so as to lose copyright." *King v. Mister Maestro, Inc., supra,* 224 F.Supp. at 101. For example, as the court in *King* noted (*ibid.*), the performance of a play is not a general publication; the public delivery of lectures on a memory system is not a general publication; the playing of a song in public is not a general publication of the work; the broadcast by radio of a script is not a general publication thereof. In brief, the oral dissemination or performance of a literary, dramatic, or musical work does not constitute a publication of that work. For a *sine qua non* of publication is the acquisition by members of the public of a possessory interest in *tangible* copies of the work in question—and manifestly in the foregoing examples nothing tangible is communicated to the public. *Nimmer, supra,* §§ 52 and 53.

Thus, in *King,* the court held that delivery by Dr. Martin Luther King of his famous speech, "I Have A Dream" before a vast public audience and over radio

and television did not amount to a general publication of his literary work.

Nor under the court's reasoning did Dr. King's distribution to the press of a mimeographed text of the speech on the morning of the demonstration constitute a general publication. Though these were tangible copies, the court pointed out that "it is clear that this was a *limited,* as opposed to a general publication." "There is nothing", the court continued, "to suggest that copies of the speech were ever offered to the *public*; the fact is clear that the 'advance text' was given to the press only" [Emphasis in original] 224 F.Supp. at 107. The *King* case thus fits squarely within the standard set forth in *White v. Kimmell, supra,* for a limited publication, namely that the circulation be limited as to persons (the press) and purpose (to assist them in following the speech).

It is against this background that we turn to the present case. Based on the undisputed facts, it is clear that when Dr. Burke voluntarily gave Professor Grzimek the film knowing it would be copied and used on German television, he allowed a general publication to occur. For, as previously indicated, the test of a general publication applies in this or any foreign country. More particularly, it seems evident that when Dr. Burke sent Professor Grzimek his film to be used in classroom lectures and on German television, he did not expressly or impliedly restrict it either as to persons or purposes. Specifically, in Dr. Burke's letter to Professor Grzimek dated September 17, 1973, he promised to send the film and merely added that he hoped the Super 8mm film he had used would be suitable for a television program. It is thus apparent that Dr. Burke placed no restrictions on the persons who could view the film, nor did he express any limitations upon the purposes for which it could be shown.

In short, the record establishes that Dr. Burke has failed to satisfy both parts of the "limited publication" test, and hence permitted a general publication to occur.

Not only did Dr. Burke fail to restrict or limit his authorization, the language of his letter of September 17, 1973, to Professor Grzimek suggests that he was honored that professional naturalists were interested in his amateur work. Dr. Burke's submission of his film to Professor Grzimek without copyright notice and without any restrictions as to use was not an action evidencing a proprietary interest in the film. There is nothing in Dr. Burke's communication to Professor Grzimek which even suggested that other copies of the film could not be made and distributed. This is evidenced by Grzimek's willingness to allow SAL to copy and use the film.

For the foregoing reasons, plaintiff's motion for partial summary judgment is denied; defendant's cross-motion for summary judgment is granted and the action is dismissed. Judgment will be entered accordingly.

Appendix B.

United States Court of Appeals for the First Circuit

No. 78-1562.

C. BRIAN BURKE, M.D.,
PLAINTIFF, APPELLANT,
v.
NATIONAL BROADCASTING COMPANY, INC.,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
[HON. HERBERT N. MALETZ, *U.S. Customs Court* *]

Before COFFIN, *Chief Judge*,
CAMPBELL AND BOWNES, *Circuit Judges*.

David L. Nixon, with whom *Randolph J. Reis, and Brown & Nixon Professional Association*, were on brief for appellant.
James E. Higgins, with whom *Daniel W. Sklar*, and *Sheehan, Phinney, Bass & Green Prof. Ass'n.*, were on brief for appellee.

May 17, 1979

CAMPBELL, *Circuit Judge*. Dr. Burke, an amateur photographer, brought this action alleging that the National Broadcasting Company (NBC) broadcast parts of a movie filmed by him in violation of his alleged common law copyright therein. The parties agreed that there were no issues of fact bearing on the question of liability and filed cross-

* Sitting by designation.

motions for summary judgment on that issue. The district court held that Dr. Burke had forfeited his common law copyright by allowing a general publication of his film to occur; from that judgment, Dr. Burke appeals.[1]

The evidence on liability, which the parties indicated at appellate argument was all the evidence they wished to submit, consisted of only affidavits by Burke and NBC and a series of letters. These and the admissions in the complaint and answer show that the movie in issue was shot by Dr. Burke while on a safari on the Serengeti Plain of East Africa (now Tanzania) in March 1972. It captured on film a highly unusual and dramatic encounter: a lioness attacks and kills a zebra foal and then, contrary to accepted belief about zebra behavior, the zebra mare returns and attacks the lioness. Only a month after this film was shot, *Natural History* magazine published an article stating that zebras do not protect their young against lions; in response, Dr. Burke wrote to the magazine and the author, telling them what he had witnessed and enclosing a photograph.

Dr. Burke's letter and photograph were published in the August/September 1972 issue of *Natural History* and were read by a Professor Bernhard Grzimek of the University of Giessen in Frankfurt, Germany. In September 1973 Grzimek wrote to Burke saying,

> "I hope that you have no objection that we print a German translation of your letter in our journal DAS TIER (THE ANIMAL). We also would like to get

[1] The parties' cross-motions were premised on the same legal principles and accepted the evidence before the court as the evidence to which those priciples should be applied. *Cf.* 6 J. Moore, *Federal Practice* ¶ 56.13, at 56-344 (2d ed. 1976) (where cross-motions are based on different legal theories as to which different facts are relevant, one does not dispose of the other).

a copy of your pictures and, in case you have done several, of the other ones too.

"I personally would like to use the film which was done of this incident in my lectures at the university and in a television programme. Is this film still available. Was it done in colour? Would it be possible to get a copy of it on my expenses?"

Grzimek was a co-editor of Das Tier and the host of an educational program about animals broadcast on German public (non-commercial) television, and was known to Dr. Burke as such by reputation. Dr. Burke sent Grzimek the following reply, in relevant part:

"It is for me a great honour that you wish to translate my letter 'Incident in the Serengeti' into 'das Tier.' Naturally, I give you permission.
"The pictures and the film will be returned to me shortly, and as soon as I receive them I shall send them to you.
"The interesting film and the pictures are in colour. The film was taken with Super 8mm film and 18 frames per second, therefore I am not quite certain if the film is feasible for television-broadcasting. This I will leave to the technicians."

Burke did send his film and pictures to Grzimek who, as far as the record shows, made a 16mm copy of the movie, used the copy in his lectures and on public television in Germany, and returned to Burke the 8mm original. Dr. Burke stated in his affidavit that he "never gave anyone else permission to use [the] film for any purpose."

The events leading to the alleged copyright infringement began three years later, in November 1976, when Survival Anglia Limited (SAL), a British company specializing in nature films, wrote to Grzimek asking about the footage he had of a zebra attacking a lioness. Grzimek forwarded the film with a cover letter in which he said, "In the text must be mentioned that this shot was taken by an American visitor, [Dr. Burke]." The Executive Director of SAL thanked Grzimek for the film and wrote,

"We will make sure that a credit is given to Dr. Burke and will return a complete dupe master to you.
"Can you please let me know what we should do about paying Dr. Burke?"

In response, Grzimek wrote that he had paid Burke for some still photographs but not for the movie film, and that he "had the impression that [Dr. Burke]was quite happy that his film was used in television. If you want to contact him, his address is . . . ."

SAL proceeded to use 33 feet of Burke's film in its production, "The Parenthood Game," without contacting Burke. NBC thereafter bought "The Parenthood Game" and broadcast it in this country between 8 and 9 p. m. on January 27, 1977. Only on February 14, 1977, did someone from SAL write to Burke telling him that his film had been used saying,

"We have a letter from Prof. Grzimek telling us you are happy for your film to be used, but not mentioning any reimbursement.
"Could you please let me know what payment is due to you, and I will process this."

In reply, Dr. Burke denied that Grzimek had permission to release the film, asserted that he retained the copyright to the film, and requested reimbursement according to SAL's usual rates. To date, he has received nothing.

This action against NBC is based on a claim of common law copyright, Dr. Burke never having obtained a statu-

tory copyright on his film. Because we find the case close, and because we are in disagreement with the judgment below, we shall first review at some length the relevant legal principles.

At common law the creator of a literary or artistic work has the right to copy and profit from it, and can distribute or show it to a limited class of persons for a limited purpose without losing that right. The right continues until the creator allows a "general" publication of his work to occur; the work then passes into the public domain and unless the creator has obtained a statutory copyright, anyone can copy, distribute or sell it for his own benefit. *Caliga* v. *Inter Ocean Newspaper Co.*, 215 U.S. 182, 188 (1909); *American Tobacco Co.* v. *Werckmeister*, 207 U.S. 284, 299 (1907).[2]

The common law recognizes three ways of exposing a work to the public: exhibition or performance, limited publication, and general publication. Of these, only general publication results in loss of the common law copyright by the creator.

Mere performance or exhibition of a work results, at common law, in no publication at all. *Ferris* v. *Frohman*, 223 U.S. 424, 435 (1912); *American Tobacco*, 207 U.S. at 300.[3] Under this principle, a film is not "published" if it

[2] Under the Copyright Act of 1976, 17 U.S.C. §§ 101-810, common law copyright is abolished. The Act does not affect rights with respect to causes of action that arose before January 1, 1978, however. 17 U.S.C. §§ 301(a), (b)(2).

[3] The doctrine that performance is not publication has been criticized because it allows an artist to profit from his work indefinitely, contrary to the policies of the copyright statute, which limit the life of a statutory copyright. *E.g.*, B. Kaplan, *An Unhurried View of Copyright* 85 (1967). Under the Copyright Act of 1976, distribution of copies of films for television broadcast is publication, but broadcasting in itself is not. *See* 17 U.S.C. § 101; M. Nimmer, 1 *Nimmer on Copyright* § 4.11[B], at 4-55 (1978).

merely is shown but the general public is not permitted to own — as opposed to borrow — tangible copies of it. *E.g., Patterson* v. *Century Productions, Inc.*, 93 F.2d 489 (2d. Cir. 1937), *cert. denied*, 303 U.S. 655 (1938); *DeMille Co.* v. *Casey*, 121 Misc. 78, 201 N.Y. Supp. 20 (Sup. Ct. 1923); *see* M. Nimmer, *Nimmer on Copyright* § 4.08[A], at 4-41-44 (1978) [hereafter *Nimmer on Copyright*]. Publication may be found if the circumstances suggest that the public was free to copy a work on exihibit [sic], but a prohibition against copying can be "tacitly understood" or implied. *American Tobacco*, 207 U.S. at 300.

A general publication occurs when a work is made available to members of the public at large without regard to who they are or what they propose to do with it. *See Public Affairs Associates, Inc.* v. *Rickover*, 284 F.2d 262, 270-71 (D.C. Cir. 1960), *vacated on other grounds*, 369 U.S. 111 (1962); *American Jewelers' Mercantile Agency, Ltd. v. Jewelers' Weekly Publishing Co.*, 155 N.Y. 241, 49 N.E. 872 (1898); *Nimmer on Copyright* § 4.04, at 4-18-22. A general publication is such dissemination of the work itself among the public as justifies the belief that it has been dedicated to the public and rendered common property. *American Tobacco*, 207 U.S. at 300-01; *Patterson*, 93 F.2d at 492; *King* v. *Mister Maestro, Inc.*, 224 F. Supp. 101, 106 (S.D. N.Y. 1963). It is said that courts have hesitated to find general publication if to do so would divest the common law right to profit from one's own work. *See Hirshon* v. *United Artists Corp.*, 243 F.2d 640, 644-45 (D.C. Cir. 1957); *American Visuals Corp.* v. *Holland*, 239 F.2d 740, 744 (2d Cir. 1956) (Frank, J.).

A general publication can be found where only one copy of the work passes to a member of the general public, as general publication depends on the author making the work available to those interested, and not on the number

of people who actually express an interest. *American Jewelers'*, 49 N.E. at 875; *Nimmer on Copyright* § 4.13 [A], at 4-67. Thus "[t]he common-law right is lost by the general publication or unrestricted sale of a single copy." *Bobbs-Merrill Co.* v. *Straus,* 147 F. 15, 19 (2d Cir. 1906), *aff'd,* 210 U.S. 339 (1908). Thereafter, a copyright can be preserved only by timely compliance with the copyright statute. In at least two cases involving a dispute over whether a statutory copyright existed, the sale of a single copy of a written work has been held to constitute publication such as to require compliance with or invoke the protection of the copyright statute. *Gottsburger* v. *Aldine Book Publishing Co.,* 33 F. 381 (D. Mass. 1887); *Atlantic Monthly Co.* v. *Post Publishing Co.,* 27 F.2d 556 (D. Mass. 1928).

A "limited publication," by contrast, occurs when tangible copies of the work are distributed, but to a limited class of persons and for a limited purpose. One frequently quoted formulation of this concept is that a limited publication,

> "communicates the contents of a [work] to a definitely selected group and for a limited purpose, . . . without the right of diffusion, reproduction, distribution or sale . . . [T]he circulation must be *restricted both as to persons and purpose,* or it cannot be called a private or limited publication."

White v. *Kimmell,* 193 F.2d 744, 746-47 (9th Cir. 1952) (emphasis added). While the distribution must be so restricted, however, the restrictions can be implied as well as express. *Werckmeister* v. *American Lithograph Co.,* 134 F. 321, 324 (2d Cir. 1904).

The distinction between "general" and "limited" publication is one of degree, and depends less on the creator's intentions than on his actions. *See Rickover,* 284 F.2d

at 270; *National Comics Publications, Inc. v. Fawcett Publications, Inc.,* 191 F.2d 594, 598 (2d Cir. 1951); *King,* 224 F. Supp. at 103. In cases where general publication has been found, the creator had made his work available in a manner that suggested that any interested person could have a copy. *See Nimmer on Contract* § 4.04, at 4-20-21. Thus in *Rickover, supra,* copies of Admiral Rickover's speeches had been given to the press, sent to individuals both on request and without solicitation, and sent in batches of 50 to sponsors for distribution. 284 F.2d at 271. In short, "Anyone was welcome to a copy." *Id.* General publication was also found in *White* v. *Kimmell, supra,* 193 F.2d 744: the author of a manuscript had distributed copies to friends, acquaintances and strangers, telling many to pass them on and authorizing some to make additional copies, provided they did not distribute the manuscript "in published form." 193 F.2d at 745-47. The recipients were not members of any group or association, and the author set no limitations on the number of copies to be made or on the persons to receive them — "a mere request" apparently sufficed to obtain one. 193 F.2d at 747. In *American Visual, supra,* 239 F.2d 740, the plaintiff had placed copies of his brochures on a table in a hotel where an insurance industry convention was being held, and had given additional copies to an insurance association for distribution to its member companies. The court found that, while the plaintiff had a limited purpose in distributing the work, no limitation was placed on the persons who could obtain copies, either from the hotel table or from the insurance association's member companies. *Id.* at 744.

Mere limited publication has been found where the range and purpose of distribution did not suggest that the general public was free to obtain and use the work. Thus in *Patterson, supra,* 93 F.2d 489, the court found

no general publication despite the fact that copies of the film in issue were circulated widely; the copies were sent only to non-profit groups to be shown for non-commercial purposes, with no authorization to copy them further and, apparently, with the understanding that they would be returned. In *King, supra,* 224 F. Supp. 101, the district court held that the Rev. Martin Luther King's speech, "I Have a Dream," was not in the public domain. "Advance copies" of the text were given to the press, and excerpts were later broadcast on national television and used in movie house newsreels. Although countless people heard and saw the speech given, the oral delivery was mere performance, not publication. *Id.* at 106-07. Publication occurred when the text was given to the press, but was "limited" rather than "general" — tangible copies were given only to a specific group to assist it in covering the event, and were never offered to the public at large. *Id.* at 107.[4] In *Allen* v. *Walt Disney Productions, Ltd.*, 41 F. Supp. 134 (S.D.N.Y. 1941), the composer of a song — "Old Eli March" — had loaned manuscripts thereof to various musicians, and had sent a copy to two different music companies. No copies had been sold, however, and the composition was not printed until 1936 — almost thirty years after it was written. The court found that no general publication occurred until 1936, noting that there was "no general offer or dedication to the public." *Id.* at 136. Similarly, in *McCarthy & Fischer, Inc.* v. *White,* 259 F. 364 (S.D.N.Y. 1919) (A. Hand, J.), a composer had given a copy of his song to a singer for performance, but had not dedicated it to the public: "It was not . . . a [general] publication to give the song to

[4] The result in *King* has been questioned on the ground that the distribution of the speech to the press was for ultimate dissemination to the general public. *Nimmer on Copyright* § 4.13[A], at 4-66 n.11.

a limited number of artists to sing . . . . There [was] no evidence or probability that any of the copies were sold, or that they were given out for any purpose but a limited use by a few vaudeville artists." *Id.* at 365.

The parties in the present case have called our attention to no decision that fits precisely the circumstances surrounding Dr. Burke's release of his film to Dr. Grzimek. In light of the principles and precedents just reviewed, however, we conclude that the district court erred in finding that a general publication occurred.

The district court thought that, when Dr. Burke voluntarily sent the film to Germany knowing that it would be copied and used on German television, "he did not expressly or impliedly restrict it either as to persons or purposes." In the court's view, Burke's letter of September 1973 "placed no restrictions on the persons who could view the film, nor . . . upon the purposes for which it could be shown."

As performance in itself is not publication, the fact that Dr. Burke knew the film would be copied by Dr. Grzimek and used in his lecture or on television, was not determinative. Publication did not occur merely because the film was shown to the general public. *See Patterson, supra,* 93 F.2d 489. The decisive issue was whether Burke's release of the film itself to Dr. Grzimek was, under the circumstances, a general publication. We find that it was not.

Dr. Burke sent the film to Dr. Grzimek in response to a request to have a copy to use personally in lectures and on a television program. Dr. Grzimek made a copy, apparently for his own use, but this was the extent of the copying and distribution authorized at that time. As Dr. Burke knew, Dr. Grzimek was a professor and hosted an educational program on non-commercial television. Allowing the film to be used for the purposes requested

was not a blanket authorization to use it for any purpose, much less to release it to a commercial producer. True, Dr. Burke did not state explicitly in his letter that Dr. Grzimek could not distribute copies of the film to others, or use it for other purposes, but we think such limitations are reasonably to be implied: Dr. Grzimek made a specific request to use the film for a specific purpose, and Dr. Burke's affirmative response cannot be thought to have authorized any further use or other purpose.

This is not a case like *Rickover, supra,* 284 F.2d 262, *White* v. *Kimmell, supra,* 193 F.2d 744, or *American Visuals, supra,* 239 F.2d 740, where the owners distributed copies of their work in a way that made them available to the general public. That Dr. Burke was "honored" by Dr. Grzimek's request and readily agreed to it seems a function of Dr. Grzimek's stature as a naturalist, and is consistent with believing Dr. Grizimek [sic] would use the film only for his own stated purposes. Burke states in his affidavit that he never made the film available to anyone else — there is thus no evidence of a practice of releasing copies on demand. Nor is this a case in which the recipient was directly or impliedly invited to put the film to any use he wished. Dr. Grzimek had no reason to suppose that he was free to distribute copies of the film at will, or to license its commercial use. We find that only a "limited" publication occurred, and that Dr. Burke's common law copyright was not lost.

The judgment below is reversed. As there remain no disputed facts on the question of liability, the case is remanded so that appellant's cross-motion for summary judgment may be granted. 6 J. Moore, *Federal Practice* ¶ 56.13 at 56-348-49 (2d ed. 1976). The case is also remanded for disposition on the issue of damages.

So ordered.

Appendix C.

United States Court of Appeals for the First Circuit

No. 78-1562.

C. BRIAN BURKE, M.D.,
PLAINTIFF, APPELLANT,
v.
NATIONAL BROADCASTING COMPANY, INC.,
DEFENDANT, APPELLEE.

JUDGMENT
Entered: May 17, 1979

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows:

The judgment of the District Court is reversed, and the cause is remanded so that appellant's cross-motion for summary judgment may be granted. The case is also remanded for disposition on the issue of damages.

By the Court:
/s/ DANA H. GALLUP
Clerk.

[cc: Messrs. Nixon and Higgins.]

Appendix D.

United States Court of Appeals for the First Circuit

No. 78-1562.

C. BRIAN BURKE, M.D.,
PLAINTIFF, APPELLANT,

v.

NATIONAL BROADCASTING COMPANY, INC.,
DEFENDANT, APPELLEE.

Before COFFIN, *Chief Judge*,
CAMPBELL AND BOWNES, *Circuit Judges*.

ORDER OF COURT
Entered June 11, 1979

It is ordered that the petition for rehearing herein filed May 31, 1979, be, and the same hereby is, denied.

By the Court:
/s/ DANA H. GALLUP
Clerk.

[cc: Messrs. Nixon and Higgins.]

Appendix E.

United States Court of Appeals for the First Circuit

No. 78-1562.

C. BRIAN BURKE, M.D.,
PLAINTIFF, APPELLANT,

v.

NATIONAL BROADCASTING COMPANY, INC.,
DEFENDANT, APPELLEE.

ORDER OF COURT
Entered June 19, 1979

Upon consideration of appellees motion to stay mandate pending petition for certiorari which motion was received after mandate had issued,

It is ordered that mandate is hereby constructively recalled; and

It is further ordered that mandate be, and the same hereby is, stayed pending the filing and disposition of a petition for writ of certiorari in the Supreme Court of the United States, the same to be filed by July 18, 1979 and notice of such filing to be filed promptly with the Clerk of this Court.

By the Court:
/s/ DANA H. GALLUP
Clerk.

[Cert. c., Clerk, U.S.D.C., N.H.; cc: Messrs. Reis and Higgins.]

Appendix F.

Herausgeber:
Prof. Dr. Dr. Bernhard Grzimek,
Prof. Dr. Dr. Heini Hediger,
Prof. Dr. Dr. Konrad Lorenz

Redaktion:
DAS TIER, D 6 Frankfurt a.M. 1,
Zoologischer Garten
Telefon 0611 - 2 12 37 32

Das TIER
Internationale Tierillustrierte

Mr.
C. Brian Burke, M. D.
Hitchcock Clinic
HANOVER, NEW HAMPSHIRE
U. S. A.

3rd September 1973/Ti/X/GD

Dear Mr. Burke,

I just found your letter in NATURAL HISTORY, August/September 1972 page 12 "Incident in the Serengeti". I hope that you have no objection that we print a German translation of your letter in our journal DAS TIER (THE ANIMAL). We also would like to get a copy of your pictures and, in case you have done several, of the other ones too.

I personally would like to use the film which was done of this incident in my lectures at the university and in a television programme. Is this film still available? Was it done in colour? Would it be possible to get a copy of it on my expenses?

Many thanks in advance for your co-operation,

Yours sincerely,

Ceterum censeo
progenerationem
esse delimilandam

/s/ Grzimek,
(B. Grzimek)

Appendix G.

Prof. Dr. med. C. Brian Burke
Hitchcock Clinic
Hanover, New Hampshire 03755

September 17, 1973

Professor, Dr. Dr. Bernhard Grzimek
Das Tier
D6 Frankfurt a. M.1, Zoologischer

Sehr geehrter Herr Prof. Grzimek!

Herzlichen Dank fuer Ihren Brief. Es ist fuer mich eine grosse Ehre, dass Sie meinen Brief "Incident in the Serengeti" in "Das Tier" uebersetzen wollen. Natuerlich gebe ich Ihnen die Erlaubnis.

Die Bilder und der Film werden kuerzlich an mich zuruechgegeben und so bald ich sie enhalte werde ich sie Ihnen zuschicken.

Der interessante Film und die Bilder sind in Farbe. Die Filmaufnahme ist mit Super 8mm Film und 18 Bilder pro Sekunde gemacht worden, deswengen bin ich nicht ganz sicher, ob sich der Film fuer Fernsehuebertragung verwenden laesst. Das ueberlasse ich den Technikern.

Ich werde Ost Afrika im Februar besuchen und wer weiss, was die Serengeti zu zeigen hat.

Mit freundlichen Gruss,
Prof. Dr. med. C. Brian Burke

CBB/kim

Translation

Prof.Dr.med.C.Brian Burke
Hitchcock Clinic
Hanover, New Hampshire 03755
September 17, 1973

Professor, Dr. Dr. Bernhard Grzimek
Das Tier
D6 Frankfurt a.M. 1, Zoologischer

Dear Prof.Grzimek;

Thank you for your letter. It is for me a great honour that you wish to translate my letter "Incident in the Serengeti" into "das Tier." Naturally I give you permission.

The pictures and the film will be returned to me shortly, and as soon as I receive them I shall send them to you.

The interesting film and the pictures are in colour. The film was taken with Super 8mm film and 18 frames per second, therefore I am not quite certain if the film is feasible for television-broadcasting. This I will leave to the technicians.

In February I will visit East Africa, and who knows what the Serengeti has to show.

With friendly greetings,
Prof.Dr.med.C.Brian Burke

CBB/kim

Appendix H.

Prof. DDr. BERNHARD GRZIMEK
DEFENDANT'S EXHIBIT B
C. 77-236 11/3/78
SURVIVAL ANGLIA LIMITED
Mr. Colin Willock
Executive Director
Brook House, Park Lane
LONDON W1Y 4DX, ENGLAND

8000 FRANKFURT
(MAIN) 60
Roderbergweg 183
A-43
8th of December, 1976
X-hö
Your letter of
29th November, 1976
CW/gc

Dear Colin,

thanks for your letter of 29th November. I paid Dr. Burke for the stills, but not for the film. I had the impression that he was quite happy that his film was used in television. If you want to contact him, his address is:

Prof. Dr. med. C. Brian BURKE
Department of Surgery
Dartmouth Medical School
Hanover, New Hampshire 03755, U.S.A.

As you are interested in the inflated animals, which Alan Root did for me — another film you could use would be about using my amphicar between the hippos etc. at Murchison Falls, which Alan Root did together with me years ago. An amphicar is a normal car with which you can drive into the water and swim with it. Maybe you are also interested in that?

Alan did also a nice film on the gorillas in Rwanda years ago, which shows also the volcanoes in action and the reaction of lions and zebras to artificial zebras.
Best regards,

yours ever,

/s/ Bernhard

Appendix I.

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF NEW HAMPSHIRE

CIVIL ACTION FILE No. 77-236

C. BRIAN BURKE, M.D.

vs.

THE NATIONAL BROADCASTING COMPANY

JUDGMENT

This action came on for (hearing) before the Court, Honorable Herbert N. Maletz, United States Customs Judge, presiding, by Designation and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged judgment in accordance with ORDER dated December 11, 1978.

Dated at Concord, New Hampshire, this 11th day of December, 1978.

/s/ William H. Barry, Jr.

Clerk of Court

cc: Randolph J. Reis, Esq.

James E. Higgins, Esq.